

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Sections 309(j) and)
337 of the Communications Act of 1934)
as Amended; Promotion of Spectrum)
Efficient Technologies on Certain Part 90)
Frequencies; Establishment of Public)
Service Radio Pool in the Private Mobile)
Frequencies Below 800 MHz)

WT Docket No. 99-87;
RM-9332

COMMENTS OF WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"), by its attorneys, hereby files Comments in the above-captioned proceeding.¹ WinStar is a nationwide competitive fixed wireless carrier with FCC radio licenses in a number of bands, including the 28/31 GHz ("Local Multipoint Distribution Service") and 38.6-40.0 GHz ("38 GHz") bands. WinStar currently operates in 31 markets and provides over 15,000 small- and medium-sized business customers with broadband communications services.

In the Notice, the Commission requests comments regarding the modifications Congress made in the Balanced Budget Act of 1997 to Section 309(j) of the Communications Act. Section 309(j) provides the Commission authority to auction radio licenses when mutually exclusive applications have been filed.² Among the modifications, Congress altered the Commission's

¹ In re Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, Notice of Proposed Rule Making, WT Docket No. 99-87, RM-9332 (rel. March 25, 1999) ("Notice").

² 47 U.S.C. § 309(j)(1).

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general authority to use a competitive bidding process in Section 309(j)(1) by specifically referencing the Commission's obligation under Section 309(j)(6)(E) "to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."³ Section 309(j)(1) now states:

General Authority. -- If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.⁴

With regard to this modification, the Commission requests comments on the scope and content of the Commission's obligation "to continue to avoid mutual exclusivity under Sections 309(j)(1) and 309(j)(6)(E)."⁵ In addition, the Commission requests comments on whether it should continue to use the public interest objectives of Section 309(j)(3) when considering whether alternative licensing methods are in the public interest.⁶

Congress's decision to modify Section 309(j) raises a number of issues regarding the Commission's obligations to avoid mutual exclusivity. For example, in the 38 GHz rulemaking, some parties have advanced the view that the statutory changes require the Commission to allow applicants the opportunity to resolve mutually exclusive applications prior to the implementation of a competitive bidding process.⁷ For many years, WinStar has been a proponent of auctions as a

³ 47 U.S.C. § 309(j)(6)(E).

⁴ 47 U.S.C. § 309(j)(1).

⁵ Notice, at ¶ 23.

⁶ Id. at ¶ 64.

⁷ See, e.g., DCT Transmission, L.L.C.'s Petition for Reconsideration, ET Docket No. 95-183, RM-8553, PP Docket No. 93-253, at 4 (March 9, 1998);

way to make the remaining 38 GHz spectrum available for use quickly and securely.⁸ As a practical matter, however, and given the controversy over construction of amended Section 309(j)(1), it may be advisable for the Commission to provide 38 GHz applicants an opportunity to resolve their mutually exclusive applications prior to the implementation of a competitive bidding scheme. Permitting parties to resolve mutually exclusive applications would be consistent with the recent action of the Wireless Telecommunications Bureau to issue a limited waiver of sections 1.935(a) and 1.935(b) of the Commission's rules.⁹ WinStar would not object to such an opportunity so long as the period for resolution of mutual exclusivity is suitably brief -- not more than thirty days.

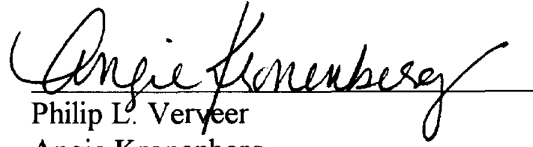
⁸ See, e.g., Comments of WinStar Communications, Inc., ET Docket No. 95-183; RM-8553; PP Docket No. 93-253, at 14-16 (March 4, 1996).

⁹ See "Wireless Telecommunications Bureau Waives Limitations on Payments in Settlement Agreements Among Parties in Contested Licensing Cases," Public Notice, DA 99-745 (rel. April 16, 1999).

Respectfully submitted,

WINSTAR COMMUNICATIONS, INC.

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August 2, 1999

CERTIFICATE OF SERVICE

I, Crystal Rogers-Starkey, do hereby certify that on this 2nd day of August 1999, a copy of the foregoing comments were delivered by hand, to the following:

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